2021 WL 5930403 (Ariz.App. Div. 1) (Appellate Brief)
Court of Appeals of Arizona, Division 1.

SAN CARLOS APACHE TRIBE, Appellant,

v.

State of Arizona; Arizona Water Quality Appeals Board;
Arizona Department Of Environmental Quality, Appellee;
Resolution Copper Mining, LCC, Intervenor/Appellee.

No. 1 CA-CV 21-0295.
October 18, 2021.

Maricopa County Superior Court No. LC 2019-000264-001

Answering Brief Of Appellee Resolution Copper Mining, LCC

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***1** Appellant San Carlos Apache Tribe's argument that the Superior Court committed reversible cannot succeed, as the Superior Court's March 25, 2021 ruling correctly resolved the dispositive issue of law: whether a modified mine being developed by Resolution Copper Mining, LLC on a site mined since the early 1900s is a "new source" as that term is used in the Clean Water Act. Given that fact, the Tribe's procedural arguments can provide no basis for relief.

The Court correctly determined that the Resolution mine does not fall within the Act's definition of "new source"-that is, it is not a mine source first established subsequent to the 1982 adoption of effluent discharge limitations specifically applicable to such mine sources. That is the same conclusion previously reached by the Arizona Department of Environmental Quality ("ADEQ"), the Arizona Water Quality Appeals Board ("Board"), and, at least implicitly, the U.S. Environmental Protection Agency ("EPA"). For good measure, the Superior Court's ruling noted that it had independently researched the issue and found no case law supporting the Tribe's position. That does not sound like the conduct of a Judge engaged in the commission of reversible error.

Likewise unavailing is the Tribe's attempt to create the impression that the Superior Court's interpretation of the meaning of legal term "new source" was caused by its improper deference to the Board. Not so. The Superior Court explicitly and correctly applied the standard of review of A.R.S. § 12-910(E); the Court's ***2** interpretation of the new source issue was not the result of impermissible deference to ADEQ's interpretation. Nor, indeed, was that interpretation even incorrect. Even if the Superior Court had given undue weight to the agency's (correct) legal interpretation, a lower court does not commit reversible error if it inadvertently provides deference to an agency's correct interpretation of law. Such a result would be particularly absurd in a case calling for remand to the agency. In any event, Resolution explains further below how the Superior Court's interpretation of law was correct, a legal issue the Tribe's brief does its best to ignore.

The Tribe's efforts to raise procedural doubt about the Board's final administrative action likewise relies on a misunderstanding of the Board's role in the administrative process and, in part, as further discussed below, is a misstatement of the underlying facts.

The Superior Court's ruling was transparent, well-reasoned, and correct. The Tribe has demonstrated no basis for reversal.

I. BOTH THE SUPERIOR COURT AND THE BOARD CORRECTLY DETERMINED THAT RESOLUTION'S MINE IS NOT A NEW SOURCE AS THAT TERM IS USED IN THE CLEAN WATER ACT.

The Tribe has argued through a series of permit renewals dating to at least 2010 that the Resolution mine is a new source that cannot obtain a permit. The Tribe has yet to cite a case for that proposition. In the proceeding below, the Superior Court found that Resolution is not a new source. That is the same conclusion reached ***3** earlier by the WQAB and by ADEQ, whose conclusion as to the Resolution permit was not second-guessed by EPA.

The Tribe's Opening Brief again cites no case authority for its assertion that a mine in Resolution's situation is a new source as a matter of law.[1] In fairness to the Tribe's opening brief, that is because there is no such case. And why is there no such case? Because, as the Superior Court noted, the Tribe is trying to use the new source argument for a purpose different from what Congress intended: to prohibit the issuance of a permit at all. *See, e.g., Opening Brief, at 21 ¶ 42* ("New sources are subject to a virtually absolute prohibition to discharge pollutants that 'cause or contribute' to a violation of water quality standards.'").[2]

The Clean Water Act's new source definition was adopted by Congress at the same time it decided that certain types of sources should be subject to source-specific standards to be developed by EPA thereafter. That begged the obvious question of when existing operations could fairly be compelled to comply with "standards of performance" that did not exist at the time construction of them was commenced. The term was adopted to prevent existing sources from operating in perpetuity under ***4** a less-stringent treatment standard. The record below, however, demonstrated that the limits imposed in Resolution's permit are the most stringent available, and that calling the Resolution mine a "new source" would not have made a difference in the limits. The Tribe contests none of that on appeal.

The statutory definition of "new source," now codified at 33 U.S.C. § 1316(a)(2), was added by Congress in the 1972 amendments to the Federal Water Pollution Control Act, since then more commonly referred to as the Clean Water Act. The 1972 amendments[3] required EPA to establish technology-based effluent limitations for existing and new sources in a variety of industries. Congress reasoned that it was appropriate to expect sources that did not yet exist to invest in a greater degree

of pollution control. *See EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980); *Rybacheck v. EPA*, 904 F. 2d 1276, 1283 (9th Cir. 1990).

The statutory definition of "new source" is found-quite intentionally-in a section of the Clean Water Act devoted to governing when existing industries must comply with the "National Standards of Performance" EPA was charged with establishing. The statute reads in pertinent part:

NATIONAL STANDARDS OF PERFORMANCE

Section 306. (a) For purposes of this section:

(1) The terms "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be ***5** achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.
(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such sources, if such standard is thereafter promulgated in accordance with this section which will be applicable to such sources, if such standard is thereafter promulgated in accordance with this section.

33 U.S.C. § 1316(a)(2) (emphasis added). The 40 CFR § 440, Subpart J guidelines-which indisputably have been incorporated into the mine's permit for as long as it has existed-are the "standards of performance" referenced in subsection (a). The purpose of the definition's existence was met when ADEQ imposed on Resolution the most stringent available limits, as the Superior Court correctly explained:
When analyzing whether something is a new source within the meaning of these regulations, it is crucial to understand why the distinction between existing sources and new sources was first recognized.

The distinction between existing and new sources is not based on special concerns arising from the new addition of pollutants to a water body. Rather, Congress recognized that the ability to use the [improved] pollution control equipment differed between existing and new sources.

Jeffrey M. Gaba, New Sources, New Growth and the Clean Water Act, 55 ALA. L. REV. 651, 656 (2004); *see also* 49 Fed. Reg. 38043 (Sept. 26, 1984) [AMRC 000332] ("This [existing-new source] distinction is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies.").

On the facts of this case, however, the reason behind the distinction between the two types of sources does not apply because ***6** that reason has already been fulfilled. There was testimony at the administrative hearing that even had RC's new construction been deemed new sources within the meaning of the applicable regulations, the effluent discharge limitations allowed under the Permit would not have changed. In other words, the Permit already requires compliance with the most stringent effluent discharge limitations required by law.

JRAAD Ruling, APP000041-42.

In addition to having to caselaw support, the Tribe's legal argument is inconsistent with the permitting approach taken by both EPA and ADEQ at other mines in Arizona and the West. Also before the Superior Court were uncontested facts illustrating that the new source interpretation applied to the Resolution mine was the same interpretation used by both ADEQ and EPA as to

other mines in the west. Combined Response Brief of Appellee Resolution Copper Mining, LLC (Electronic Index of Record ("IOR")) *591* at 23-30. The new source interpretation made as to Resolution was not the least bit out of the ordinary.

II. THE SUPERIOR COURT DID NOT ERR IN REVIEWING THE BOARD'S FINAL AGENCY ACTION, NOR WAS THE ADMINISTRATIVE LAW JUDGE'S FINDING "MANIPULATED."

The Tribe's final argument that the Superior Court committed a reversible error, Argument C, is a roundabout one, reserved for the final four pages of its brief. *Appellant San Carlos Apache Tribe's Opening Brief, at 25-28.* As explained above, the Superior Court properly concluded as a matter of law that Resolution's mine is not a new source within the meaning of the Clean Water Act. ***7** That renders Argument C of no consequence, but Resolution nevertheless will briefly address it here.

The Tribe asserts the Superior Court's reversible error occurred when the Court improperly gave "thoughtful consideration" to the wrong entity's interpretation of the meaning of new source. *Opening Brief, at 26* ("The Superior Court gave 'thoughtful consideration' to the analysis performed by ADEQ"). Assuming *arguendo* that it is ever inappropriate for a Superior Court to give "thoughtful consideration" to anyone's legal interpretations, the Tribe incorrectly describes what both the Board and the Superior Court did.

The Tribe's argument before the administrative lawjudge was that ADEQ had prematurely concluded the Resolution mine was not a new source in reliance on 40 C.F.R. § 122.2. The Tribe argued that ADEQ's analysis should have also included consideration of 40 C.F.R. § 122.29(b). The former sets forth the umbrella definition of "new source," and the latter excludes from that definition certain sources that might otherwise be captured.[4] The administrative law judge did not conclude that the Resolution mine was in fact a new source, but he did agree with the Tribe that ADEQ's new source analysis should have taken § 122.29(b) into account as well. ***8** The Board in turn asked ADEQ to conduct that § 122.29(b) analysis. ADEQ did so and reported to the Board. Unsurprisingly, since § 122.29(b) contracts rather than expands the defined universe of new sources, ADEQ did not change its conclusion that the Resolution operation was not a new mine source. The WQAB adopted that interpretation of § 122.29(b) in its *Final Administrative Decision Appendix Two, APP000051.* That is, both ADEQ on remand and the Board in its role as the promulgator of ADEQ's final agency action for judicial review purposes concluded that the Resolution mine was not a new source within the meaning of § 122.29(b) as well as § 122.2.

That was likewise the conclusion of the Superior Court, and whether it reached that conclusion after giving "consideration" to one entity's analysis or the other's is of no consequence (putting aside yet again that considering anyone's legal interpretation does not constitute a violation of A.R.S. § 12-910(E) in any event).

Additionally, the Tribe's contention that the Superior Court's reference to "ADEQ" must mean the Court failed to review the WQAB ruling is belied by the ruling itself. The Superior Court's ruling clearly states that the issues on review pertain to the decision by the Board as the final agency actor for *ADEQ. Order, Appendix One, APP00038.*

***9** III. THE BOARD'S PARTIAL REMAND TO ADEQ WAS NOT ILLEGAL.

The Tribe's Argument A asserts that the Board made procedural errors in its interim order of November 8, 2018. In that interim order, the Board adopted in part and rejected in part the proposed findings of fact and conclusions of law of the administrative law judge and remanded the matter to ADEQ for further analysis. The Superior Court properly ruled that the Tribe waived its right to raise the issue on appeal to the Superior Court by failing to object to the remand and complaining only after the requested supplemental analysis was completed. *Order, Appendix One, APP000043-44.*

Moreover, the Tribe's argument lacks merit in any event. First, the Board's *Final Administrative Decision (Appendix Two)* did not reject any of the administrative law judge's proposed findings of fact. Rather, as the Superior Court noted *(Appendix One, APP000043),* the Board properly allowed ADEQ to temporarily disregard certain facts so they would not constrain the agency's

§ 122.29(b) analysis. The Board subsequently adopted those facts. *Final Administrative Decision, Appendix Two, APP000049.* Second, the record before the Board and the Superior Court contained overwhelming evidence in support of the decision that the Resolution mine need not be treated as a new one. *See, e.g., Combined Response Brief of Appellee Resolution Copper Mining, LLC, IOR 591 at 6-23; Resolution Copper Mining, LLC's Proposed Findings of Fact and* ***10** *Conclusions of Law, IOR 119* at 3-5, 18-23, 28-32, 37-38, 52-58; *IOR 105* at 2-3, 10-21, 28-35, 37 (ADEQ).

IV. CONCLUSION.

The Superior Court's new source interpretation was indisputably correct, and the Tribe has raised no reversible error. The Superior Court's denial of the Tribe's appeal of the Board's ruling should be upheld.

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Respectfully submitted,

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Footnotes

1 The Tribe's main authority, *Friends of Pinto Creek v. U.S. EPA,* 504 F.3d 1007 (9th Cir.) (2007), *cert. denied,* 555 U.S. 1097 (2009), involved proposed construction of a brand new mine in a greenfield area.

2 The Tribe's Opening Brief accordingly itself refutes the unfounded accusation that the Superior Court engaged in "offensive speculation" about the Tribe's legal strategy of blanket opposition to the mine. *Opening Brief, at 28 ¶ 61.*

3 Public L. 92-500, 86 Stat. 854 (Oct. 18, 1972).

4 While it is not necessary for resolution of this appeal, the express terms of § 122.29(b) confirm that ADEQ's original approach was the correct one; § 122.29(b) states that its criteria are relevant only to a potential new source that first falls within the new source definition of § 122.2.

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